

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

TAM CONG NGUYEN,

Petitioner,

vs.

JAMES SCHOMIG, et al.,

Respondents.

Case No. 2:04-CV-00109-RCJ-(RJJ)

**ORDER**

Before the Court are Tam Cong Nguyen's (Tam) Amended Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (#25), Respondents' Answer (#26) and Response (#43), and Tam's Replies (#28, #46). The Court denies the Amended Petition (#25).

The basic facts of this case are not in dispute. Tam suspected that his wife, Tammy Nguyen (Tammy), was carrying on an affair with a co-worker, Dennis Vanduser. Tammy and Vanduser worked at the Excalibur Hotel-Casino in Las Vegas. On March 16, 1998, Tam confronted the two in the employee parking lot. The result was a bloody mouth and a ban from the property for Tam. Then, on April 5, 1998, Tam returned to the Excalibur, armed with a .357 Magnum revolver. Later, Tammy entered the van and drove to the front entrance, where she picked up Vanduser. Instead of dropping Vanduser off at his home, Tammy drove to another place and stopped. Vanduser began to touch and kiss Tammy. Tam then introduced himself by firing a shot. A scuffle ensued, Tam fired more shots, and he killed Vanduser.

The state charged Tam with burglary while in possession of a firearm, for entering the van with the intent to commit assault, battery, or a felony. The state also charged Tam with first

1 degree murder with the use of a deadly weapon, for killing Vanduser while perpetrating a burglary  
 2 or after lying in wait. Tam offered several explanations for his behavior: He was extremely  
 3 emotionally disturbed because his wife was having an affair, the thought that Tammy and Vanduser  
 4 were about to have sexual intercourse in the van provoked him to the point of killing Vanduser, or  
 5 he acted in self defense. The jury agreed with the prosecution on the murder charge but could not  
 6 come to a verdict on the burglary charge. Tam received a sentence of life imprisonment with the  
 7 possibility of parole after twenty (20) years for the murder charge, and an equal, consecutive  
 8 sentence for the deadly-weapon enhancement. The trial court dismissed the burglary charge. Ex.  
 9 D.<sup>1</sup> The Nevada Supreme Court affirmed on direct appeal. Ex. F. Tam then filed his first state  
 10 habeas corpus petition. Ex. H. The district court denied that petition. Ex. J. Tam appealed, and the  
 11 Nevada Supreme Court affirmed. Ex. L. Tam then filed in quick succession a motion to correct or  
 12 vacate an illegal sentence, Ex. M, a second state habeas corpus petition, Ex. P, and a third state  
 13 habeas corpus petition, Ex. S. The state district court denied the illegal-sentence motion. Ex. N.  
 14 The state district court denied the second and third state habeas corpus petitions as untimely and  
 15 successive. Exs. Q, T. The Nevada Supreme Court affirmed. Ex. V; Opposition (#16), attached  
 16 exhibit.

17 “A federal court may grant a state habeas petitioner relief for a claim that was  
 18 adjudicated on the merits in state court only if that adjudication ‘resulted in a decision that was  
 19 contrary to, or involved an unreasonable application of, clearly established Federal law, as  
 20 determined by the Supreme Court of the United States,’” Mitchell v. Esparza, 540 U.S. 12, 15  
 21 (2003) (quoting 28 U.S.C. § 2254(d)(1)), or if the state-court adjudication “resulted in a decision  
 22 that was based on an unreasonable determination of the facts in light of the evidence presented in  
 23 the State court proceeding,” 28 U.S.C. § 2254(d)(2).

24 A state court’s decision is “contrary to” our clearly established law if it “applies a  
 25 rule that contradicts the governing law set forth in our cases” or if it “confronts a set  
 26 of facts that are materially indistinguishable from a decision of this Court and  
 nevertheless arrives at a result different from our precedent.” A state court’s decision  
 is not “contrary to . . . clearly established Federal law” simply because the court did

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 28 <sup>1</sup>Unless stated otherwise, exhibits are attached to Respondents’ Motion to Dismiss (#11).

1 not cite our opinions. We have held that a state court need not even be aware of our  
2 precedents, “so long as neither the reasoning nor the result of the state-court decision  
contradicts them.”

3 Id. at 15-16. “Under § 2254(d)(1)’s ‘unreasonable application’ clause . . . a federal habeas court  
4 may not issue the writ simply because that court concludes in its independent judgment that the  
5 relevant state-court decision applied clearly established federal law erroneously or incorrectly.  
6 Rather, that application must be objectively unreasonable.” Lockyer v. Andrade, 538 U.S. 63, 75-76  
7 (2003) (internal quotations omitted).

8 The petitioner bears the burden of proving by a preponderance of the evidence that he  
9 is entitled to habeas relief. Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004), cert. dismissed,  
10 \_\_\_ U.S. \_\_\_, 126 S. Ct. 410 (2005).

11 In Ground One, Tam claims that his trial counsels provided ineffective assistance.  
12 “[T]he right to counsel is the right to the effective assistance of counsel.” McMann v. Richardson,  
13 397 U.S. 759, 771 & n.14 (1970). A petitioner claiming ineffective assistance of counsel must  
14 demonstrate (1) that the defense attorney’s representation “fell below an objective standard of  
15 reasonableness,” Strickland v. Washington, 466 U.S. 668, 688 (1984), and (2) that the attorney’s  
16 deficient performance prejudiced the defendant such that “there is a reasonable probability that, but  
17 for counsel’s unprofessional errors, the result of the proceeding would have been different,” id. at  
18 694. “[T]here is no reason for a court deciding an ineffective assistance claim to approach the  
19 inquiry in the same order or even to address both components of the inquiry if the defendant makes  
20 an insufficient showing on one.” Id. at 697.

21 Strickland expressly declines to articulate specific guidelines for attorney  
22 performance beyond generalized duties, including the duty of loyalty, the duty to avoid conflicts of  
23 interest, the duty to advocate the defendant’s cause, and the duty to communicate with the client  
24 over the course of the prosecution. 466 U.S. at 688. The Court avoided defining defense counsel’s  
25 duties so exhaustively as to give rise to a “checklist for judicial evaluation of attorney  
26 performance. . . . Any such set of rules would interfere with the constitutionally protected  
27 independence of counsel and restrict the wide latitude counsel must have in making tactical  
28 decisions.” Id. at 688-89.

1           Review of an attorney's performance must be "highly deferential," and must adopt  
2 counsel's perspective at the time of the challenged conduct to avoid the "distorting effects of  
3 hindsight." Strickland, 466 U.S. at 689. A reviewing court must "indulge a strong presumption that  
4 counsel's conduct falls within the wide range of reasonable professional assistance; that is, the  
5 defendant must overcome the presumption that, under the circumstances, the challenged action  
6 'might be considered sound trial strategy.'" Id. (citation omitted).

7           The Sixth Amendment does not guarantee effective counsel per se, but rather a fair  
8 proceeding with a reliable outcome. See Strickland, 466 U.S. at 691-92. See also Jennings v.  
9 Woodford, 290 F.3d 1006, 1012 (9th Cir. 2002). Consequently, a demonstration that counsel fell  
10 below an objective standard of reasonableness alone is insufficient to warrant a finding of  
11 ineffective assistance. The petitioner must also show that the attorney's sub-par performance  
12 prejudiced the defense. Strickland, 466 U.S. at 691-92. There must be a reasonable probability that,  
13 but for the attorney's challenged conduct, the result of the proceeding in question would have been  
14 different. Id. at 94. "A reasonable probability is a probability sufficient to undermine confidence in  
15 the outcome." Id.

16           If a state court applies the principles of Strickland to a claim of ineffective assistance  
17 of counsel in a proceeding before that court, the petitioner must show that the state court applied  
18 Strickland in an objectively unreasonable manner to gain federal habeas corpus relief. Woodford v.  
19 Visciotti, 537 U.S. 19, 25 (2002) (per curiam).

20           In the pre-trial proceedings and the trial, two attorneys represented Tam. First, he  
21 retained John Wawerna. After a fee-payment dispute, the court allowed Wawerna to withdraw and  
22 appointed Kedric Bassett, a deputy public defender. Tam presents multiple claims of ineffective  
23 assistance. Many of them are duplicates, with only the attorney's identity differing. The Court will  
24 group these claims topically and not proceed through each one sequentially.

25           First and seventh, Tam claims that Wawerna and Bassett, respectively, failed to  
26 move for the provision of an interpreter. The Nevada Supreme Court noted that Tam himself had  
27 said in the preliminary hearing that he did not need an interpreter. Therefore, counsel had no reason  
28

1 to think that Tam needed one. Ex. L, p. 4. See also Ex. B, p. 3. This was a reasonable application  
2 of Strickland. 28 U.S.C. § 2254(d)(1). If Tam had changed his mind later, he needed only to ask.

3 Second, third, eighth, and tenth, Tam claims that Wawerna and Bassett failed to  
4 make a proper motion for a psychiatric evaluation of Tam, and that Wawerna failed to move for a  
5 competency hearing of Tam. The Nevada Supreme Court held:

6 Appellant did not state what psychiatric condition he suffered from which rendered  
7 him incompetent or any facts known to his counsel which should have alerted them  
8 that appellant may have been incompetent. Appellant did not even allege that he was  
9 in fact incompetent. Therefore, appellant failed to show that counsels' performance  
fell below an objective standard of reasonableness, and the district court did not err  
in denying this claim.

10 Ex. L, p. 3. A review of Tam's state habeas corpus petition bears this out. Even his current  
11 Amended Petition (#25) does not allege these facts. Tam did not meet his burden of pleading and  
12 proving his claims, and the Nevada Supreme Court applied Strickland reasonably. 28 U.S.C.  
13 § 2254(d)(1).

14 Fourth, sixteenth, and seventeenth, Tam claims that Wawerna, Bassett, and the  
15 public defender's investigator tried to coerce him into pleading guilty pursuant to an agreement.  
16 The Nevada Supreme Court held:

17 This claim is without merit. Appellant did not accept a plea agreement, therefore, he  
18 cannot show a reasonable probability that but for counsels' alleged error the result of  
19 the trial would have been different. Therefore, appellant failed to show that counsel  
was ineffective in this regard and the district court did not err in denying this claim.

20 Ex. L, p. 4. This was a reasonable application of Strickland.

21 Fifth, Tam claims that Wawerna failed to file any pre-trial motions that were  
22 beneficial to the defense. The Nevada Supreme Court held that Tam had failed to allege what  
23 motions Wawerna could have filed. Ex. L, p. 4. Because Tam has the burden of pleading and  
24 proving his case, this was a reasonable application of Strickland.

25 Sixth, twelfth, and thirteenth, Tam claims that he asked Wawerna and Bassett for  
26 copies of discovery and disclosures, but they did not give him anything other than crime scene  
27 photographs and police descriptions of the seized evidence. The Nevada Supreme Court found that  
28 Tam had not alleged what else counsels should have provided, nor how the failure to provide that

1 evidence caused him prejudice. Ex. L, pp. 3-4. Even in the Amended Petition (#25), Tam does not  
2 allege what else counsels could have provided. The Nevada Supreme Court applied Strickland  
3 reasonably.

4 Ninth, Tam claims that Bassett failed to review the disclosed police reports, which  
5 would have corroborated Tam's suicidal talk before and after he killed Vanduser. The Nevada  
6 Supreme Court held:

7 To the extent that this claim is supported by factual allegations, it is belied by the  
8 record. The jury heard testimony refuting and corroborating these assertions.  
9 Appellant testified that he did not threaten to kill himself or his family after getting  
10 into a fist-fight with the decedent. Appellant testified that he was so "distressed"  
11 over the possibility that his wife might be having an affair with the decedent, that he  
12 told her "why don't you go take a gun and shoot me. Kill me. Kill all my kids. I  
13 can't live like this." Appellant's son testified that when appellant returned home  
after the murder he was despondent, and stated while holding the gun used as the  
murder weapon, that there was "no reason for me to live anymore." Appellant's son  
testified that he believed his father wanted to kill himself because of the murder, and  
that he took the gun away from appellant so that appellant could not shoot himself.  
Therefore, appellant failed to show that counsel was ineffective in this regard and the  
district court did not err in denying this claim.

14 Ex. L, p. 5. Because the corroborating statements were presented to the jury, the Nevada Supreme  
15 Court applied Strickland reasonably.

16 Eleventh, Tam claims that Bassett failed to interview any of the witnesses whose  
17 names Tam provided. Tam might have provided names to Bassett, but he did not provide any  
18 names to the Court, nor did he provide any information about what these witnesses' testimonies  
19 would be. If Tam is referring to the same people mentioned in his ninth claim of ineffective  
20 assistance, then this claim is redundant and meritless, because those people did testify. Otherwise,  
21 Tam has failed to allege any deficient performance by Bassett and prejudice to himself.

22 Fourteenth, Tam claims that Bassett failed to file a motion to hire an expert to get a  
23 second opinion on Tam's state of mind. The Nevada Supreme Court noted:

24 Appellant failed to state what kind of expert should have been called and what that  
25 expert would have testified to. Moreover, Dr. Daniel Lee, a psychologist,  
26 neuropsychologist, and forensic psychologist with extensive experience working with  
27 Vietnamese refugees, conducted a comprehensive psychological assessment and  
28 clinical in-depth interview of appellant. Dr. Lee testified at trial that he believed that  
appellant was not in control of his actions when he shot the victim. Therefore,  
appellant failed to show that counsel's performance fell below an objective standard  
of reasonableness or that he was prejudiced. Accordingly, the district court did not  
err in denying this claim.

1 Ex. L, p. 6. This was a reasonable application of Strickland. Additionally, Dr. Lee's testimony was  
2 favorable to Tam, and Dr. Lee's expertise could not have been more compatible with Tam's  
3 situation. It is hard to imagine how another expert could have contributed anything more.

4 Fifteenth, Tam claims that Bassett abandoned the potentially viable defense based  
5 upon Tam's extreme motional distress or disturbance. On this issue, the Nevada Supreme Court  
6 held:

7 On direct appeal, this court determined that there was "clearly sufficient evidence" to  
8 establish that appellant acted with deliberation and premeditation, and that the  
9 evidence establishing murder by lying in wait was "overwhelming" and provided "a  
10 distinct, valid basis for the general verdict of first-degree murder." Further litigation  
regarding this issue is barred by the doctrine of the law of the case. Therefore,  
appellant failed to show that counsel was ineffective in this regard and the district  
court did not err in denying this claim.

11 Ex. L, pp. 7-8 (footnotes omitted). Additionally, the record belies this claim. As noted above, Dr.  
12 Daniel Lee testified that because of Tam's distressed emotional state, he was not in control of his  
13 actions. Ex. E, pp. 12-13. Bassett did what Tam claims he should have done.

14 Eighteenth, Tam claims that Bassett failed to move for the dismissal of the charge of  
15 burglary while in possession of a firearm. Nineteenth, Tam claims that Bassett failed to move for a  
16 continuance of the trial to investigate the burglary charge. The Nevada Supreme Court held that  
17 Tam suffered no prejudice because the jury did not find him guilty of burglary. Ex. L, p. 7.<sup>2</sup> This  
18 was a reasonable application of Strickland.

19 Twentieth, Tam claims that Bassett was ineffective for urging Tam to waive his right  
20 to be sentenced by the judge, from whom he might have received a lesser sentence. Normally, the  
21 jury sets the penalty for a person convicted of first-degree murder, but in non-capital cases the  
22 parties may stipulate to waive the separate penalty hearing and to have the trial judge set the penalty.  
23 Nev. Rev. Stat. § 175.552. The Nevada Supreme Court held:

24 Thirteenth, appellant claimed that trial counsel was ineffective for advising appellant  
25 to waive the right to be sentenced by the court rather than the jury. To the extent that  
26 this claim is supported by the factual allegations, it is belied by the record. Prior to  
the beginning of the trial, the district court had a lengthy and somewhat ardent  
discussion with appellant as to whether, if convicted, he would waive the penalty

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27  
28 <sup>2</sup>The district court ultimately dismissed the burglary charge. Ex. D.

1 hearing and agree to be sentenced by the district court. Appellant repeatedly  
2 informed the court that he would not waive the penalty phase. Therefore, appellant  
3 failed to show that counsel was ineffective in this regard and the district court did not  
err in denying this claim.

4 Ex. L, pp. 8-9. The Nevada Supreme Court appears to have held that Bassett's advice did not  
5 amount to ineffective assistance of counsel, because Tam followed that advice. This Court is not  
6 prepared to call that a reasonable application of Strickland.

7 Regardless, Tam does not allege facts that could show that he suffered any prejudice  
8 in the form of a heavier sentence from the jury than what he could have received from the judge.  
9 Non-capital first-degree murder has three possible penalties: (1) life imprisonment without the  
10 possibility of parole, (2) life imprisonment with the possibility of parole after twenty (20) years, or  
11 (3) a definite prison term of fifty (50) years with the possibility of parole after twenty (20) years.  
12 Nev. Rev. Stat. § 200.030(4)(b). The jury set the penalty at life imprisonment with the possibility of  
13 parole after twenty (20) years. Because the jury had found Tam guilty of using a deadly weapon to  
14 murder Vanduser, by law Tam received an equal, consecutive sentence. See Nev. Rev. Stat.  
15 § 193.165. Even if Tam had received consecutive fifty-year terms instead of consecutive life terms,  
16 he would still be eligible for release from incarceration only after forty years at the earliest. The  
17 only difference is when the sentences would expire. Tam's actual sentence expires when he expires.  
18 The consecutive fifty-year terms would expire after seventy years at the earliest, if Tam is paroled  
19 from his first term after twenty years. Tam came to America in 1975 at age nineteen. Ex. E, pp. 13-  
20 14. He was sentenced on January 6, 1999, with two hundred seventy-five days of credit for time  
21 spent in jail. Ex. D. The consecutive fifty-year terms would expire at the earliest some time in  
22 2068, when Tam would be around one hundred twelve years old. Even if Bassett was wrong to urge  
23 Tam to be sentenced by the jury, and even if the judge would have imposed the fifty-year terms  
24 instead of the life terms, Tam would not have suffered any practical prejudice. This claim is  
25 without merit.

26 In Ground Two, Tam claims that appellate counsel was ineffective for not raising  
27 extreme emotional disturbance as a ground on appeal. Tam does not allege what appellate counsel  
28 would have done. As noted above, Tam did present evidence of extreme emotional disturbance to

1 the jury. The jury still found him guilty of first-degree murder. Questions of fact are the jury's right  
 2 and duty to decide. Ewing's Lessee v. Burnet, 36 U.S. (11 Pet.) 41, 50-51 (1837). Appellate  
 3 counsel had nothing to challenge. Therefore, appellate counsel provided effective assistance.

4 In Ground Three, Tam claims that appellate counsel was ineffective for unspecified  
 5 reasons. In Ground Five, Tam argues that the trial court erred in admitting prejudicial evidence of  
 6 other, unspecified wrong acts. Each ground is actually nothing but a reference to pages 5A through  
 7 5J and pages 3 through 3C of his Amended Petition (#25). However, in those pages he does not  
 8 even mention appellate counsel or other wrong acts. Because Tam has failed to state the facts  
 9 supporting these grounds, the Court denies them. Rule 2(c), Rules Governing Section 2254 Cases  
 10 in the United States District Courts. See also Mayle v. Felix, 545 U.S. 644, \_\_\_, 125 S. Ct. 2562,  
 11 2569-70 (2005).

12 In Ground Seven, Tam claims that, at the preliminary hearing, the justice of the peace  
 13 failed to properly canvas or warn Tam that waiver of an interpreter at the preliminary hearing would  
 14 continue throughout the proceedings. In state court, Tam raised this ground for the first time in his  
 15 third habeas corpus petition. The Nevada Supreme Court held that that petition was untimely and  
 16 successive. Opposition (#16), attached exhibit (citing Nev. Rev. Stat. §§ 34.726, 34.810).

17 Respondents argue that Ground Seven is procedurally defaulted. A federal court will not  
 18 review a claim for habeas corpus relief if the decision of the state court regarding that claim rested  
 19 on a state-law ground that is independent of the federal question and adequate to support the  
 20 judgment. Coleman v. Thompson, 501 U.S. 722, 730-31 (1991).

21 In all cases in which a state prisoner has defaulted his federal claims  
 22 in state court pursuant to an independent and adequate state  
 23 procedural rule, federal habeas review of the claims is barred unless  
 24 the prisoner can demonstrate cause for the default and actual prejudice  
 as a result of the alleged violation of federal law, or demonstrate that  
 failure to consider the claims will result in a fundamental miscarriage  
 of justice.

25 Id. at 750; see also Murray v. Carrier, 477 U.S. 478, 485 (1986). The grounds for dismissal upon  
 26 which the Nevada Supreme Court relied in this case are adequate and independent state rules. Vang  
 27 v. Nevada, 329 F.3d 1069, 1074 (9th Cir. 2003) (Nev. Rev. Stat. § 34.810); Loveland v. Hatcher,

231 F.3d 640 (9th Cir. 2000) (Nev. Rev. Stat. § 34.726); Moran v. McDaniel, 80 F.3d 1261 (9th Cir. 1996) (same).

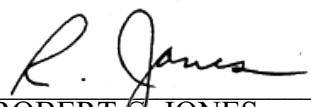
To demonstrate cause to excuse a procedural default, the petitioner must “show that some objective factor external to the defense impeded” his efforts to comply with the state procedural rule. Murray, 477 U.S. at 488 (emphasis added). For cause to exist, the external impediment must have prevented the petitioner from raising the claim. See McCleskey v. Zant, 499 U.S. 467, 497 (1991).

Tam’s response is to refer the Court to the equivalent ground that he raised in his third state habeas corpus petition, Ex. S, pp. 7-7b, and to the ground in his first state habeas corpus petition that he was denied his right to an interpreter, Ex. I, pp. 31-32. Other than that, Tam makes no attempt to show good cause and prejudice. See Reply (#28), p. 6. If Tam is trying to show that he raised a similar ground in an earlier petition, then the attempt fails. Tam’s ground in his first state habeas corpus petition that he was denied a right to an interpreter was itself procedurally defaulted because he could have raised it on direct appeal but did not. Ex. L, p. 10 (citing Nev. Rev. Stat. § 34.810). This Court dismissed its equivalent, Ground Four, as procedurally defaulted. Order (#24), pp. 5-6. Because Ground Four is procedurally defaulted, it cannot serve as cause and prejudice to excuse the procedural default of Ground Seven. See Edwards v. Carpenter, 529 U.S. 446 (2000). The Court dismisses Ground Seven.

The other grounds in the Amended Petition (#25) have already been disposed. Grounds Four, Six, and Ten were procedurally defaulted. Tam dismissed Ground Eight as unexhausted.

IT IS THEREFORE ORDERED that the Amended Petition for a Writ of Habeas Corpus (#25) is **DENIED**. The Clerk of the Court shall enter judgment accordingly.

DATED this 12th day of February, 2007.

  
ROBERT C. JONES  
United States District Judge